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LEAGUE OF CALIFORNIA CITIES

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November 30, 2004

Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 9th Street, Suite 300
Sacramento, California 95814

RE: Initial Briefing for Case Nos: 04-RL-3759-02; 04-RL-3760-03; 04-RL-3916-04; and 04-RL-3929-05

Dear Ms. Higashi:

This letter brief is submitted on behalf of the League of California Cities. The League of California Cities is an association of 474 California cities united in promoting the general welfare of cities and their citizens. We offer the following answers to the questions raised in these cases:

1. Does Statutes 1980, chapter 1143 impose a new program or higher level of service within an existing program on cities, counties, or a city and county within the meaning of section 6, Article XIIIB of the California Constitution and costs mandated by the state pursuant to section 17514?

Yes. Statutes 1980, chapter 1143 has not changed and continues to impose a new program or higher level of service within an existing program on cities, counties, or a city and county within the meaning of section 6, Article XIIIB of the California Constitution and costs mandated by the state pursuant to section 17514. We respectfully disagree with Senator Ducheny's opinion that the original parameters and guidelines were in error. Local governments have been allowed to seek reimbursement for "review of the allocation data provided by the Council of Governments or DHCD regarding the locality's share of regional housing needs" in order to determine whether the data is a fair reflection of its share of the regional housing needs. Although the statute does not require a local government to review the data or appeal the decision of a COG or DHCD, the review or appeal is part of the process for receiving its fair share of regional housing needs. A local government's fair share of regional housing needs is the foundation of the housing element. Preparation of the housing element is the mandate imposed by the statute. Review of regional fair share numbers is an essential step in the preparation of the housing element and, therefore, a reimbursable activity.

2. Are Council of Governments eligible claimants under article XIIIB, section 6 of the California Constitution?

Yes. Article XIIIB, section 6 requires reimbursement to a "local agency." "Local agency" means "any city, county, special district, authority, or other political subdivision of the state."[1] A "council of government" means "a single or multicounty council created by a joint powers agreement pursuant to Chapter 5 (commencing with Section 6500) of Division 1 of Title 1."[2] A joint powers agreement creates a "joint powers authority" which is a public entity separate and distinct from the parties that created the authority.[3] A council of government is an "authority" within the meaning of Government Code section 17518.

We must respectfully disagree with Senator Ducheny's reference to two cases for the proposition that a council of government may not submit a claim for reimbursement. These cases did not hold that a council government may not submit a claim for reimbursement. Rather, they held that a community redevelopment agency may not submit a claim for reimbursement.

3. Does Government Code section 17556 preclude the Commission from finding that any of the statutory provisions impose costs mandated by the state?

No. Government Code section 17556 only precludes the Commission from finding that the state is required to reimburse local agencies if they have the authority to impose a fee to fund the mandate. Government Code section 65584.1 provides neither the COGS nor cities and counties with valid authority to impose fees for the distribution of regional housing needs.

Government Code section 65584.1 purports to provide the councils of governments with the authority to charge a fee to local governments to cover their costs to distribute regional housing needs.. However, the statute unconstitutionally interferes with the organic structure of these councils of governments. As noted above, a council of government is a joint powers authority formed pursuant to Government Code sections 6500 and following. A joint powers authority's "constitution" or "charter" is the joint powers agreement which sets forth the powers that can be exercised and the limitations on those powers.

A joint powers agreement is required to state the purpose of the agreement or the power to be exercised. It provides for the method by which the purpose will be accomplished or the manner in which the power will be exercised.[4] The agreement is a contract between the joint power authority's member agencies. Some agreements may have granted the JPA (the COG) fee levying authority. Other agreements may not have granted that authority to the JPA. A state law that authorizes a council of government to impose a fee when the joint powers agreement does not authorize the imposition of a fee violates the

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[1] Government Code section 17518.
[2] Government Code section 65582(b).
[3] Government Code sections 6503.7 and 6507.
[4] Government Code section 6503.

contract clause of the State Constitution.[5] The Legislature may not interfere with the terms of this contract between cities and counties by granting authority which contradicts the terms of the joint powers agreement.

Assuming that the COG charges a fee to its member jurisdictions for its costs to distribute regional housing needs, section 65584.1 purports to authorize a city, county, or city and county to turn around and impose a fee on developers to reimburse itself for the cost of the fee charged by the council of governments. Fees are distinguished from taxes in two principal ways: (1) the amount of the fee may not exceed the estimated reasonable cost of providing the particular service or facility for which the fee is charged; and (2) the service or facility for which the fee is charged must bear a relationship to the person or entity paying the fee.[6] Section 65584.1 requires this fee to be imposed pursuant to Section 66106 which limits the amount of the fee to the estimated amount *to provide the service* for which the fee is levied. However, the city is not providing any service to the developer. The city did not incur costs to distribute regional housing needs. The COG provided the service. The COG incurred the costs. This pass-through fee charged to pay for the work of the council of governments does not comply with Section 66106 and is a tax which requires voter approval.[7]

Government Code section 17556 precludes the Commission from finding "costs mandated by the state" if the commission finds that the local agency has the authority "to levy service charges, fees, or assessments *sufficient* to pay for the mandated program or increased level of service" (emphasis added). In order for the Commission to be precluded from finding "costs mandated by the state," it must find that local agencies have the authority to impose fees in an amount sufficient to pay for their costs to comply with the housing element statute. Senator Ducheny suggests that Government Code section 65104 is such authority. Section 65104 prohibits a fee to "support the work of the planning agency," to exceed the reasonable cost of providing the service for which the fee is charged." Assuming that Section 65104 authorizes a city, county, or city and county to impose a fee on a development application to recover the costs of complying with the housing element law, such a fee may not be "sufficient" to pay for the mandated program.

Under section 65104, such a fee may not "exceed the reasonable cost of providing the service." Under section 66016, such a fee may not "exceed the estimated amount required to provide the service." The problem is mathematical: A city that spends $100,000 to develop and adopt a housing element may be unable to determine what portion of the total amount is the "reasonable cost" or "estimated amount" of providing the service to the developer who will pay the fee. Should a developer that proposes to build 500 homes pay a higher fee than a developer that proposes to build 100 homes? Should a developer that proposes to build apartments pay a higher fee than the developer

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[5] Cal. Const. art. I, section 9.

[6] *Associated Homebuilders of the Greater East Bay v. City of Livermore*, 56 Cal.2d 847; *United Business Commission v. City of San Diego*, 91 Cal.App.3d 165 (1979).

[7] Government Code section 66106(a).

that proposes to build single-family homes? Will a fee be "sufficient" to pay for the preparation of a housing element if the costs are recovered over a seven-year period?[8] A fee that exceeds the reasonable cost of providing the service is a tax which requires voter approval.[9]

Housing developers argue that fees charged by local governments increase the cost of housing. It seems highly ironic for the State to encourage a city, county, or city and county to impose a fee on a housing developer to pay for the preparation of a housing element which has, as its objective, providing for the local government's fair share of the regional housing need for all income levels.

Thank you for your consideration of this information. We look forward to participating in this process as it moves forward.

Sincerely,

Betsy Strauss

Betsy Strauss
Special Counsel
League of California Cities

c: DeAnn Baker, CSAC
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[8] Seven years includes two years to prepare and adopt the housing element plus the five-year housing element cycle.
[9] Government Code section 50076.